

CURRENT DEVELOPMENTS

Stretching Abstract Reasoning to its Limits

The IACtHR and the Right to a Healthy Environment

PEDRO VILLARREAL — 6 April, 2018



The Inter-American Court of Human Rights issued the Advisory Opinion (AO) of 15 November, 2017 ([OC-23/17](#)), on the subject matter of the environment and human rights. Its wide-ranging features already sparked a lively debate in the blogosphere (see [here](#), [here](#) and [here](#)). Whereas some welcome the Court's engagement with environmental rights, others are either skeptical of the way in which the AO deals with criteria of state responsibility in human rights violations. I argue firstly, that these criticisms lack in nuance regarding the abstract nature of AOs in the Inter-American Human Rights System. Secondly, I will briefly address the pending challenge of establishing causality in the right to a healthy environment.

The Cognitive Limits of Advisory Opinions

The AO OC-23/17 was issued after [a request by the government of Colombia](#) regarding the “Cartagena Convention” of 1983, on one hand, and the American Convention on Human Rights (ACHR) of 1969, on the other hand. At stake here were the right to a (dignified) life (Article 4.1 ACHR), and to personal integrity (Article 5.1 ACHR), with regards to the impact of environmental damage.

Here, I would like to part ways with [certain criticisms](#) leveled against this AO. Namely, the non-inclusion by the Court of more developed guidelines for action has been put into question, particularly in comparison with the European Court of Human Rights (ECtHR). Likewise, they point to the lack of a reference to, inter alia, criteria of “sufficiently proximate repercussions” and “real and immediate risk” as thresholds for attributing state responsibility in human rights violations. The ECtHR has developed these ideas e.g. in the judgment in *Ilasçu and Others v. Moldova and Russia* for “sufficiently proximate repercussions” (para. 317); and in the judgment in *Rantsev v. Cyprus and Russia* for “real and immediate risk” (para. 219).

A formal-procedural objection to this criticism consists of inherent limits to the Court's answers to questions posed in the abstract. The Court has previously ascertained the reach of its jurisdiction liberally. It can even reformulate the state's questions as it sees fit, and it did so in the case of Colombia's request (para. 34). A different matter is how

detailed and fact-sensitive its abstract arguments can be. As in previous AOs, the Court emphasizes that its interpretations, though not stemming from actual disputes, are meant to be applied in concrete situations (para. 20). The main obstacle for this lies at the cognitive level: How could a Court, in the abstract, ever foresee all the factual details of future occurrences? And if this is not possible without an actual case at hand, could there be any blueprints for complex circumstances which cannot be grasped at once?

Causality Reloaded: How to Determine a Double-Chain Causality

Furthermore, there is an even broader substantial-material objection, falling beyond the scope of any Court's appraisal of causality. When dealing with actual harm to someone's physical integrity or even a threat to life, a double chain of causation needs to be established: Firstly, a link between activities such as e.g. petroleum exploration and exploitation through offshore drilling, maritime transportation of hydrocarbons, port construction and maintenance, or the construction, maintenance and expansion of shipping canals (examples already singled out in para. 28 of Colombia's request), and a damage caused to the environment. Secondly, another link is required between the environmental damage resulting from the activity, and a harm to a person's health –which may fall under the IACtHR's understanding of the right to a (dignified) life and to personal integrity (para. 109). In fact, if the harm is caused to a person residing in another State's territory, it would extend the functional jurisdiction of the state of origin (para. 101). Other posts have addressed this extraterritorial reach of a state's jurisdiction with more depth.

The first part of the causal link, that is, ascertaining a transboundary damage to the environment itself, would fall under the jurisdiction of other international courts. The most recent ruling by the International Court of Justice on compensation in the Costa Rica v. Nicaragua saga provides more insights into how this can be fleshed out on a state-to-state level. Alternatively, under Article 23 of the Cartagena Convention, its Contracting Parties can opt for arbitration in case of disputes related to its provisions.

Conversely, the second part of the causal link, i.e. harm to a person's property, health or life (paras. 64 and 120), would fall directly under the purview of the IACtHR. But this conceptual step is not easily translated to concrete terms. It defies prevailing understandings of causality. To underscore this point: Recent research undertaken by the Lancet Commission on Pollution and Health deals with this causal link between the environment and people's health. Broadly speaking, the challenging task of tracing causality can span several decades. Focusing too much on proximity for the purposes of justiciability at the IACtHR may risk overlooking the issue of how environmental degradation is dramatically contributing to the global burden of disease. The consequences of pollution for health may be invisible for a person today. Yet they may appear only when proximity is no longer present.

Conclusion: Remaining Gaps in the Justiciability of Environmental Rights

Placing the challenge of addressing the full extent of environmental problems at the Inter-American System of Human Rights would entail stretching its reach too far. Therefore, this post did not purport to advance an argument for an even more expansive interpretation of the IACtHR's jurisdiction. But underscoring the broader dimensions of the contours of environmental health doesn't hurt, either. The two-sided risk of imbalance consists of over- and underestimating the limits of the IACtHR, either by limiting causality to a threshold of proximity, or by doctrinal proposals to erase this threshold altogether. Whatever one's normative position may be, the intricacies behind

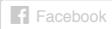
past, present and future contentious cases at the IACtHR will end up clarifying towards which side the balance can and will tilt.

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